

(130)	W68BP	Dayton, Ohio
(131)	W51BI (CP)	Kirtland, Ohio
(132)	W32AR	Lexington, Ohio
(133)	W21AI	Portsmouth, Ohio
(134)	W47BC	Springfield, Ohio
(135)	W39AI	Youngstown, Ohio
(136)	W36AY	Zanesville, Ohio
(137)	K44BQ	Ardmore, Oklahoma
(138)	K27AZ	Lawton, Oklahoma
(139)	K33AG	Bend, Oregon
(140)	K33AO	Coos Bay, Oregon
(141)	K59DU	Grants Pass, Oregon
(142)	K58BG	Klamath Falls, Oregon
(143)	K21BC	Lakeview, Oregon
(144)	K57EK	Medford, Oregon
(145)	K14HA	Roseburg, Oregon
(146)	W44AG	Erie, Pennsylvania
(147)	W52BO	Meadville, Pennsylvania
(148)	W65CG (CP)	Pittsburgh, Pennsylvania
(149)	W42BJ	State College, Pennsylvania
(150)	W11BC	Williamsport, Pennsylvania
(151)	W40AW (CP)	Beaufort, South Carolina
(152)	W44AX	Charleston, South Carolina
(153)	W66BJ	Myrtle Beach, South Carolina
(154)	K20DA	Aberdeen, South Dakota
(155)	K15CW	Brookings, South Dakota
(156)	K38CQ	Huron, South Dakota
(157)	K27DB	Madison, South Dakota
(158)	K63EE (CP)	Mitchell, South Dakota
(159)	K33CO	Rapid City, South Dakota
(160)	K51EE	Sioux Falls, South Dakota
(161)	K31DP	Yankton, South Dakota
(162)	W46AJ	Cookeville, Tennessee
(163)	W66AZ	Farragut, Tennessee
(164)	W35AH	Jackson, Tennessee
(165)	W31AS	Morristown, Tennessee
(166)	K51CK	Abilene, Texas
(167)	K63DR	Austin, Texas
(168)	K26AP	Brownwood, Texas
(169)	K47ED	College Station, Texas
(170)	K57FC (CP)	Corpus Christi, Texas

(171)	K46DL (CP)	Kingsville, Texas ^{22/}
(172)	K53EH (CP)	Lubbock, Texas
(173)	K17BP	Palestine, Texas
(174)	K42DA	Paris, Texas
(175)	K20BW	San Antonio, Texas
(176)	K33CK	San Antonio, Texas
(177)	K15BV	Uvalde, Texas
(178)	K43DV	Victoria, Texas
(179)	K64CJ	Ogden, Utah
(180)	K39AK	Vernal, Utah
(181)	W16AL (CP)	Burlington, Vermont
(182)	W32BA	Lynchburg, Virginia
(183)	W49AP	Roanoke, Virginia
(184)	W24OI (CP)	Virginia Beach, Virginia ^{23/}
(185)	K23AS	Aberdeen, Washington
(186)	K36DG	Longview, Washington
(187)	K55EB	Spokane, Washington
(188)	K57FJ (CP)	Spokane, Washington
(189)	W39AZ	Parkersburg, West Virginia
(190)	W68BS	Green Bay, Wisconsin
(191)	W19BH	Janesville, Wisconsin
(192)	W33AX	Madison, Wisconsin
(193)	W42AF	Ripon, Wisconsin
(194)	W20AG	Sheboygan, Wisconsin
(195)	W55BY (CP)	Waupaca, Wisconsin
(196)	K35CN	Green River, Wyoming

80. Trinity also operates a cable television program service which reaches nearly 25,000,000 homes throughout the country via Trinity's uplink satellite facilities.

81. Paul F. Crouch, who is president and a director of Trinity, is also the president and a director of the following corporations, all of which are non-profit, non-stock corporations operating as tax-exempt public charities:

^{22/} Formerly K62DY, Port Lavaca, Texas

^{23/} Formerly, W24OI, Norfolk, Virginia

- a. **Trinity Broadcasting of Arizona, Inc. ("TBA")**, licensee of:
 - (1) **Full Power Television Station**
KPAZ-TV, Phoenix, Arizona (license acquired July 21, 1977)
 - (2) **Television Translator Stations:**
 - (a) K58AV Cottonwood, Arizona
 - (b) K62BA Flagstaff, Arizona
 - (c) K56ED Tucson, Arizona
 - (d) K57BD Tucson, Arizona
- b. **Trinity Broadcasting of Denver, Inc.**, licensee of low power television station K57BT, Denver, Colorado.
- c. **Trinity Broadcasting of Florida, Inc.**, licensee of full power television station WHFT-TV, Miami, Florida (license acquired July 1980).
- d. **Trinity Broadcasting of Washington, Inc.**, licensee of full power television station KTBW-TV, Tacoma, Washington (license acquired November 30, 1984).
- e. **Trinity Broadcasting of Indiana, Inc.**, licensee of full power television stations:
 - (1) WKOI(TV), Richmond, Indiana (CP acquired May 19, 1980); and,
 - (2) WCLJ(TV), Bloomington, Indiana (CP acquired August 12, 1986)
- f. **Trinity Broadcasting of New York, Inc.**, licensee of full power television station WTBV-TV, Poughkeepsie, New York (license acquired July 13, 1982).
- g. **Trinity Broadcasting of Texas, Inc.**, licensee of full power television station KDTX-TV, Dallas, Texas (license acquired July 2, 1986).

h. Jacksonville Educators Broadcasting, Inc., licensee of:

(1) Full Power Noncommercial Television Stations:

- (a) WTCE(TV) Fort Pierce, Florida**
- (b) WJEB(TV) Jacksonville, Florida**

(2) Television Translator Stations:

- (a) W66CC Melbourne/Fellsmere, Florida**
- (b) W47BG (CP) West Palm Beach, Florida**

i. Community Educational Television, Inc., licensee of full power noncommercial television stations:

- (1) KETH(TV) Houston, Texas**
- (2) KITU(TV) Beaumont, Texas**
- (3) KLUJ(TV) Harlingen, Texas**

j. National Minority TV, Inc. ("NMTV"), licensee of:

(1) Full Power Television Station

KNMT(TV), Portland, Oregon (CP acquired December 19, 1988)

(2) Television Translator Stations:

- (a) K33DE Little Rock, Arkansas**
- (b) K56DZ Fresno, California**
- (c) K21DP (CP) Sacramento, California**
- (d) W40AZ Wilmington, Delaware**
- (e) W22BP (CP) Thomasville, Georgia^{24/}**
- (f) K51EC Lake Charles, Louisiana**
- (g) W18AY Portland, Maine**
- (h) W20BA Massena, New York**
- (i) W59CH (CP) Syracuse, New York**
- (j) W24BK Columbus, Ohio**
- (k) W46BX Toledo, Ohio**
- (l) W68CD Toledo, Ohio**
- (m) W62BV Charlotte, North Carolina**
- (n) W51BR (CP) Columbia, South Carolina**
- (o) W66CA (CP) Spartanburg, South Carolina**
- (p) K20DM (CP) Amarillo, Texas**
- (q) K53EN (CP) Temple, Texas**

^{24/} Formerly W38BP, Panama City, Florida.

- | | | |
|-----|------------|---------------------------|
| (r) | K26DL | Wichita Falls, Texas |
| (s) | K36CJ | Salt Lake City, Utah |
| (t) | W45AZ (CP) | Charleston, West Virginia |
| (u) | W19BK | Huntington, West Virginia |
| (v) | W26BG (CP) | Geneva, New York |
| (w) | W67DA (CP) | Richmond, Virginia |

(3) **Applicant for:**

- | | | |
|-----|------------|---------------------------|
| (a) | Channel 26 | Scranton, Pennsylvania |
| (b) | Channel 58 | Charlottesville, Virginia |
| (c) | Channel 32 | Knoxville, Tennessee |
| (d) | Channel 52 | Oswego, New York |
| (e) | Channel 69 | Asheville, North Carolina |
| (f) | Channel 66 | Opelousas, Louisiana |
| (g) | Channel 18 | Hampton, Virginia |

82. Jane Duff, a former officer of Trinity,^{25/} is also an officer and a director of National Minority TV, Inc.; Community Educational Television, Inc.; and, Jacksonville Educators Broadcasting, Inc. Mrs. Duff is also an officer (assistant secretary) of: Trinity Broadcasting of Florida, Inc.; Trinity Broadcasting of Oklahoma City, Inc.; Trinity Broadcasting of Denver, Inc.; Trinity Broadcasting of Washington; Trinity Broadcasting of Indiana, Inc.; Trinity Broadcasting of New York, Inc.; Trinity Broadcasting of Arizona, Inc.; and, Trinity Broadcasting of Texas, Inc.

83. Janice W. Crouch, a director and vice president of Trinity, is also an officer and director of: Trinity Broadcasting of Florida, Inc.; Community Educational Television, Inc.; Jacksonville Educators Broadcasting, Inc.; Trinity Broadcasting of Arizona, Inc.; Trinity Broadcasting of Denver, Inc.; Trinity Broadcasting of Indiana, Inc.; Trinity Broadcasting of New York, Inc.; Trinity Broadcasting of Oklahoma City, Inc.; Trinity Broadcasting of Texas, Inc.; and, Trinity Broadcasting of Washington.

^{25/} See footnote 10, supra.

84. Norman G. Juggert, a secretary-treasurer and director of Trinity, is also an officer and director of: Trinity Broadcasting of Florida, Inc.; Trinity Broadcasting of Arizona, Inc.; Trinity Broadcasting of Denver, Inc.; Trinity Broadcasting of Indiana, Inc.; Trinity Broadcasting of New York, Inc.; Trinity Broadcasting of Oklahoma City, Inc.; Trinity Broadcasting of Texas, Inc.; Trinity Broadcasting of Washington; Jacksonville Educators Broadcasting, Inc.; and, Community Educational Television, Inc.

85. Messrs. Matthew Crouch, Terrence M. Hickey and Allan Brown are officers (assistant secretaries) but not directors of the same corporations as Dr. Paul Crouch, except Matthew Crouch is not an officer of National Minority TV, Inc. or Jacksonville Educators Broadcasting, Inc.^{26/}

2) Glendale^{27/}

86. Glendale is a corporation organized under Delaware law. The only class of stock which is authorized is common voting stock. George F. Gardner is the owner of 51 shares of Glendale's common voting stock, and Mary Anne Adams, Mr. Gardner's daughter, is the owner of 49 shares of common voting stock. Ms. Adams and Mr. Gardner are the two directors of the corporation. Mr. Gardner is the President, Treasurer, and Secretary of Glendale, and Ms. Adams is the Vice President, Assistant Secretary and Assistant Treasurer. There are no other officers, directors, or stockholders of Glendale.

^{26/} In Trinity's Informational Notice, n. 10, supra, it was reported that Messrs. Brown and Hickey are no longer officers (assistant secretaries) of National Minority TV, Inc.

^{27/} All findings in this Section are from Glendale Exhibits 1 and 2.

87. Mr. Gardner holds 100% voting control of the following mass media facilities:

a. Low Power Television (LPTV) Station

Low power television station W40AF, Dillsburg, Pennsylvania

b. Cable Television (CATV) Systems

(1) TV Cable of Carlisle

Subscribers: 16,103

Communities: Carlisle, Mt. Holly Springs, North Middleton, South Middleton, Monroe, Middlesex, Silver Spring, Dickinson, West Pennsboro, Carroll, and Penn (all in Pennsylvania)

Active Channels: 56

Local origination: 1 channel

(2) TV Cable of Berkeley County

Subscribers: 4,046

Communities: Berkeley County and Hedgesville (West Virginia)

Active Channels: 42

Local origination: 1 channel

(3) TV Cable of Central PA (Avis Headend)

Subscribers: 6,893

Communities: Renovo, South Renovo, Chapman, Noyes, Avis, Salladasburg, Pine Creek, Wayne, Porter, Crawford, Dunnstable, Nippenose, Piatt, Watson, Mifflin, Cummings, Limestone, and Jersey Shore (all in Pennsylvania)

Active Channels: 39

Local origination: 1 channel

(4) TV Cable of Waynesboro (Ft. Loudon Headend)

Subscribers: 1,401

Communities: Peters, Metal, St. Thomas, and Hamilton (all in Pennsylvania)

Active Channels: 33

Local origination: 1 channel

(5) TV Cable of Waynesboro (Blue Ridge Summitt Headend)

Subscribers: 8,036

Communities: Waynesboro, Washington, Quincy, Mont Alto, and Guilford (all in Pennsylvania), Washington and Frederick Counties (both in Maryland)

Active Channels: 43

Local origination: 1 channel

(6) GH Cable Arizona (Payson Headend)

Subscribers: 4,577

Communities: Payson, Gila County, Round Valley, Oxbow Estates, Mesa Del, and Star Valley (all in Arizona)

Active Channels: 36

Local origination: 1 channel

(7) GH Cable Arizona (Pine Strawberry Headend)

Subscribers: 1,272

Communities: Pine, Strawberry, Gila County (all in Arizona)

Active Channels: 23

Local origination: None

(8) GH Cable Arizona (Christopher Creek Headend)

Subscribers: 122

Communities: Christopher Creek and Gila County (both in Arizona)

Active Channels: 12

Local origination: None

(9) GH Cable Arizona (Bear Flats Headend)

Subscribers: 26

Communities: Bear Flats and Gila County (both in Arizona)

Active Channels: 5

Local origination: None

(10) GH Cable Arizona (Kohls Ranch Headend)

Subscribers: 184

Communities: Kohls Ranch, Gila County, Tonto Village, and Thompson Draw (All in Arizona)

Active Channels: 12

Local origination: None

(11) GH Cable Arizona (Williams Headend)

Subscribers: 1041

Communities: Williams and Coconino County (both in Arizona)

Active Channels: 23

Local origination: None

(12) GH Cable Arizona (Concho Headend)

Subscribers: 153

Communities: Concho and Apache County (both in Arizona)

Active Channels: 13

Local origination: None

(13) GH Cable Arizona (St. John's Headend)

Subscribers: 742

Communities: St. Johns and Apache County (both in Arizona)

Active Channels: 20

Local origination: 1 channel

(14) GH Cable Arizona (Eagar Headend)

Subscribers: 1,271

Communities: Springerville, Eagar, and Apache County (all in Arizona)

Active Channels: 22

Local origination: 1 channel

(15) GH Cable Arizona (Columbia Headend)

Subscribers: 3,159

Communities: Columbia and Marion County (Mississippi)

Active Channels: 32

Local origination: 1 channel

III. PROPOSED CONCLUSIONS OF LAW

A. Glendale's Short-Spacing Issue

1) Introduction

88. In the Hearing Designation Order initiating this proceeding, DA 93-602, ¶ 5 (June 14, 1993), the Commission designated Trinity's WHSG-TV renewal application, and Glendale's construction permit application, for consolidated hearing pursuant to section 309(e) of the Communications Act. 47 U.S.C. § 309(e). That section of the Communications Act provides, inter alia, that any hearing held thereunder "shall be a full hearing in which the applicant and all other parties of interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant ..." It was therefore, Glendale's obligation alone to establish, in conformance with the Commission's rules and past holdings, that it was entitled to a waiver of the television channel spacing rule (rule 73.610(b)).

89. As stated in WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969), "[a]n applicant for waiver faces a high hurdle even at the starting gate [and] '[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action; Rio Grande Family Radio Fellowship, Inc. v. FCC, [406 F.2d 664 (D.C. Cir. 1968)]" (underlining added). Glendale has not met this burden, and the "facts and circumstances" in this case do not warrant a waiver of the spacing rule to permit Glendale to further decrease the spacing between channels 63 in Monroe and Montgomery.

2) Glendale Admits it Made no Effort to Find a Fully Spaced Site

90. The Commission's policy on television short-spacing is succinctly stated in K-W TV, Inc., 7 FCC Rcd. 3617, 3618, 70 Rad. Reg. 2d (P&F) 1655, 1657 (1992), as follows:

The Television Table of Allotments was established so that stations in a given community could operate with maximum power and antenna height without creating objectional interference to neighboring stations. To maintain the integrity of the Table, it was necessary to establish minimum mileage separation and to allow only limited deviations from those separations. Those spacing requirements presumptively serve the public interest, and applicants seeking waivers to operate from short-spaced sites are required to demonstrate that the public interest will be better served by a waiver in the circumstances presented than by following the terms of the rule.

In applying this policy, the Commission begins with the following:

Before we can consider the public interest arguments that may support a waiver request, the threshold question is whether no fully spaced sites are available. (Id.) (underlining added).^{28/}

The record evidence overwhelming establishes that Glendale made no attempt whatsoever to meet that threshold obligation (Fdgs. ¶¶ 7-11).

91. Glendale's only involved principal and 51% owner, George Gardner, admitted that:

At no time during the process of locating Glendale's original [or amended] antenna site, nor during the preparation of Glendale's application for Channel 63 at Monroe, did I or Mary Anne Adams instruct Messrs.

^{28/}The Court of Appeals has held that:

"an applicant seeking a waiver ... must make a threshold showing, using legitimate engineering evidence, that no properly spaced location is obtainable." North Texas Media, Inc. v. FCC, 778 F.2d 28, 32 (D.C. Cir. 1985).

Mullaney, Allen or Daly to look for an antenna site that was fully spaced to the Channel 63 Montgomery, Alabama allocation. I was therefore unaware at [both] time[s] whether there were any fully spaced sites at which Glendale could propose to locate its antenna site (Fdgs. ¶¶ 9-10).

This astonishing admission was made even though Glendale's engineer had identified in a map circulated to Mr. Gardner, Mr. Daly and Glendale's FCC counsel, the area where a fully spaced site could be located (Fdgs. ¶ 7, 16). Nevertheless, Glendale made no effort at all to look for a fully-spaced site, and thus it cannot make the required threshold showing. K-W TV, Inc., supra; Townsend Broadcasting Corporation, 62 F.C.C.2d 511, 512, 38 Rad. Reg. 2d (P&F) 880, 881 (1976); and North Texas Media, Inc. v. FCC, supra.^{29/} Having failed to meet its threshold burden, its waiver request must be denied. 47 U.S.C. § 309(e).^{30/}

3) The Public Interest Does Not Support a Waiver of the Channel Spacing Rule

92. Once an applicant meets its burden of showing there are no fully spaced sites available--which Glendale has not done--the Commission has identified seven public interest factors to be evaluated when acting on waiver requests. These factors are: (1) the unsuitability of the existing site in terms of economic viability for the station or in a licensee's ability to reach significant numbers of viewers who lacks a network or independent service; (2) the magnitude of the short spacing; (3) the nature and extent of any predicted loss of service that would result from a grant of the short-spacing; (4) the

^{29/} In a short spacing waiver involving FM applicants, the Review Board has held that failure to make to an independent search for a fully-spaced site is fatal to a request for a waiver of the short-spacing rules. On the Beach Broadcasting, 7 FCC Rcd. 1346, 1351, 70 Rad. Reg. 2d (P&F) 880, 886 (Rev. Bd. 1992).

^{30/} See also, Ogden Television, Inc., 7 FCC Rcd. 3116 (VSD 1992) (proposal to move from a site that was short-spaced to two allotment reference points to a site that would eliminate one short-spacing but increase the other denied).

aeronautical and environmental benefits and drawbacks of locating a tower in a particular area; (5) the concerns, if any, expressed by the licensee to which short-spacing would result; (6) the extent to which the licensee obtains its license knowing there were spacing restraints; and (7) the technical proposal an applicant makes to reduce or eliminate objectionable interference. K-W TV, Inc., supra, 70 Rad. Reg. 2d (P&F) 1657). Glendale has attempted to characterize its short-spacing proposal as de minimis, and to invoke three of the public interest factors: (1) its proposal leaves a suitable area where applicants for channel 63 in Montgomery could locate fully spaced sites; (2) that its technical proposal would cause less interference than a fully-spaced station; and (3), the aeronautical considerations of locating near WHSG's current site (Fdgs. ¶¶ 13-15). None of these factors, however, either individually or collectively, warrant waiver of the Commission's television channel spacing rule. (See paragraphs ¶¶ 95-98, infra.)

4) Glendale's Proposed Site is Not Excusable as a de minimis Waiver of the Spacing Rules

93. Glendale's requested waiver would move the Monroe, Channel 63 site even closer to the Montgomery reference point than it is now as a result of WHSG's grandfathered short spacing (Fdgs. ¶ 14). Glendale is therefore proposing to aggravate the existing short-spacing. It contends that because WHSG is short-spaced by 18.14 kilometers, and its proposal would be short-spaced by 18.4 kilometers, the increase in short-spacing is merely 0.26 kilometers and is excusable as de minimis (Fdgs. ¶ 14). This position subverts the Commission's policy, and seriously misconstrues the de minimis exception articulated in Kenter Broadcasting Co., 62 Rad. Reg. 2d (P&F) 1573,

1577, n. 9 (1986). The de minimis exception justifies a short-spacing waiver only "when the short-spacing is de minimis" (Id.). A de minimis short-spacing is defined as a short-spacing of not more than one mile (1.6 kilometers) (Id.) (underlining added). Here the 18.4 kilometer short spacing proposed by Glendale is far more than de minimis. It is legally impermissible to have the de minimis exception apply when a short-spacing exceeds 1.6 kilometers. Moreover, the policy is not applicable because the increase over WHSG's existing short-spacing is only 0.26 kilometers. The amount of the increase is not relevant. What is relevant is the total distance by which Glendale's proposed site is short-spaced. As the Commission plainly stated in Kenter, the de minimis exception will not be enforced "in any case ... where the applicant propose[s] to be short-spaced by more than one mile or 1.6 kilometers" (Id.).

94. Glendale's de minimis argument also fails because the TV short-spacing rule, rule 73.610(a), expressly prescribes, even by grandfathered short-spaced stations, any increase in an existing short-spacing. Specifically, the Note to section 73.610(a) provides that while grandfathered stations may continue to operate, "in no event may they further reduce the separations below the minimum" (underlining added). This reflects a very strong Commission policy against allowing any aggravation of existing short-spacings. Glendale's site proposal violates this prohibition, and essentially seeks to do what the Commission's rule specifically prevents WHSG from doing. Accordingly, even if Glendale were deemed entitled to a short-spaced site because WHSG's site is short spaced, it is plainly barred from proposing a site that is more short-spaced than that of WHSG.

5) The Public Interest Does Not Support Glendale's Waiver Request

(a) Glendale Has Not Identified Any Site Within the Area Left for Placement of a Fully-Spaced Channel 63, Montgomery Facility

95. In Ogden Television, Inc., *supra*, the permittee of an unbuilt construction permit for channel 16 in Provo, Utah had originally been granted a short-spacing waiver of 11.8 kilometers to the reference point for vacant channel 16 in Cedar City, Utah, and 5.7 kilometers short of the reference point for vacant channel 15 in Price, Utah. When the permittee was unable to conclude successful negotiations with the land owner for the approved site, it sought to further amend its construction permit to a site that would no longer be short-spaced to the channel 15, Price, allocation, but would increase from 11.8 kilometers to 22.7 kilometers its short-spacing with channel 16, Provo. The permittee sought to justify this waiver by noting it would provide unobstructed coverage to Provo and a first off-the-air signal to certain areas. This waiver request was denied because even though short-spacing to the Price allocation would have been eliminated, an increase in the previously approved short-spacing would occur. While Glendale's proposal does not increase the current short-spacing to the same degree, the principle is the same--the public interest is not served when short-spacings are increased. In addition, Glendale's proposal offers none of the supporting factors put forth by the Provo, Utah permittee--a first service and elimination of shadowing.

96. Moreover, similar to Glendale, the applicant in Ogden Television made no attempt to demonstrate the unavailability of fully spaced sites, and while the applicant asserted as Glendale does, that there would still be a suitable area for future applicants to specify a fully spaced site for channel 63, Montgomery, that argument was rejected

because there was no showing whether any sites were indeed available within that remaining area. Ogden Television, 7 FCC Rcd. 3118. Similarly, while Glendale has noted there would be a 517 square kilometer area remaining where a fully spaced site could be located, there is no showing that there are in fact sites available within that area or that such sites would be consistent with the Commission's rules (Fdgs. § 15). Further, the Commission does not favor short-spaced proposals which restrict the ability of future applicants to find a site that would meet all Commission requirements. Ogden Television, 7 FCC Rcd. 3117.

(b) Equivalent Protection is a Minor Factor in Spacing Waivers and Does Not Justify Grant of a Waiver Request

97. Glendale also attempts to support its waiver by noting that its directional operation would cause no more interference to the Montgomery allocation than would a station using maximum facilities from a fully spaced site (Fdgs. ¶ 15). However, an applicant's proposal to provide equivalent protection, standing alone, does not support waiver of the television channel spacing rules. K-W TV, Inc., *supra*, at 70 Rad. Reg. 2d (P&F) 1657. For example, in Sarkes Tarzian, Inc., 6 FCC Rcd. 2465, 69 Rad. Reg. 2d (P&F) 157 (1991), the Commission granted a waiver request, allowing the licensee to relocate from a fully spaced site to one that was short-spaced, on a showing that additional service to underserved areas would be provided (a first CBS network service to over 40,000 people), and because mountainous terrain was blocking the service to a large area and population within the station's grade B contour. While it was noted that the applicant's directional service would cause no more interference than a station using maximum facilities from a fully spaced site, that was only a minor factor, which, by

itself, would not justify a waiver. See also Murray Hill Broadcasting Company, 8 FCC Rcd. 325, 326, 71 Rad. Reg. 2d (P&F) 1335, 1336 (1993) (FM licensee denied waiver request based in part on a claim of equivalent protection).

- (c) Glendale Never Submitted a Fully Spaced Site Proposal to the FAA, and it Moved Close to the WHSG Tower Merely to Save Processing Time with the FAA

98. Glendale's communications with the FAA and its decision to locate close to the WHSG tower also do not support its waiver request. As Mr. Allen, Glendale's FAA consultant, stated Glendale submitted only two sites to the FAA for approval--its original February 1992 proposal, and its March 1993 amended proposal (Fdgs. ¶ 14). At no time did Mr. Allen (or anyone else at Glendale), however, give any consideration during the FAA approval process of the FCC's television channel spacing rules or discuss other possible site locations (*Id.*). When Glendale learned that the FAA was going to reject its initial proposal, it determined to move close to the WHSG tower simply to save processing time (Fdgs. ¶ 13-14). Mr. Allen testified that he was aware that if Glendale specified a site to the FAA that was more than one mile from its original proposal, or WHSG's tower, a new aeronautical study would be required (Fdgs. ¶ 13). Mr. Allen also knew that such a proposal "would take[] several months to complete, and there would always be a possibility that the FAA would reject the new tower construction proposal (*Id.*). Glendale's consulting engineer, Mr. Mullaney, also confirmed that "it was not practical for Glendale to specify a site which was more than 280.8 kilometers from the Montgomery reference point" because that would require a new aeronautical study, and that "process would take several months (6-8 months)"

(Fdgs. ¶ 13). It was the delay Glendale anticipated in having the FAA process a new aeronautical study, not the FAA directing that Glendale locate close to the WHSG tower, that drove Glendale's decision to move to its current site (Fdgs. ¶ 13-14). In fact, the "goal post" concern Mr. Allen testified to would have been eliminated by proposing a fully spaced site. This is why Glendale moved closer to the WHSG tower--to save time--not to accommodate FAA concerns (Fdgs. ¶ 13). As a result it has failed to meet the public interest requirements supporting its channel spacing waiver request.

6) Glendale Seeks Preferential Treatment in the Processing of its Waiver Request

99. In comparative renewal proceedings, it is impermissible to impose disparate requirements between the challenger and the incumbent licensee that would create a pro-incumbent bias. EZ Communications, Inc., 8 FCC Rcd., 2448, 2450 (ASD 1993); Royce International Broadcasting, 2 FCC Rcd. 1368 (ASD 1987). This standard grew out of the Court of Appeals decision in Las Vegas Valley Broadcasting v. FCC, 589 F.2d 594, 600 (D.C. Cir. 1978). In Las Vegas Valley the court cautioned against a pro-incumbent bias and held that an "unrealistically stringent" financial qualification standard could not be imposed on a renewal challenger (Id.). In Las Vegas Valley, the renewal challenger had to demonstrate that it had "reasonable assurance" for the availability of its construction and first quarter operating expenses. Las Vegas Valley, 589 F.2d at 599. However, the Commission had improperly applied a "legally binding [financial] commitment" requirement to the challenger, thus creating an "unrealistically stringent" requirement for the challenger which did not exist for the incumbent. Importantly, however, the court did not exempt the challenger from establishing

financial qualifications under the "reasonable assurance" standard. Las Vegas Valley, 589 F.2d at 599-600.

100. In the short-spacing context, it is not "unrealistically stringent" to require a challenger to specify a fully spaced site if one is available. That is no more stringent than requiring a challenger to meet the "reasonable assurance" standard and obtaining a bank letter if one is available. Glendale had an obligation in this proceeding to meet the "threshold requirement" of establishing that there were no fully spaced sites available. This it did not do. Indeed, Glendale made absolutely no effort at all to determine if there were any fully spaced sites, even though it had identified at the outset the area for fully spaced sites (Fdgs. ¶¶ 7, 16). Instead, Glendale seeks preferential treatment. Its proposal increases the grandfathered short-spacing over that of WHSG by 0.26 kilometers (Fdgs. ¶ 14). Under the TV channel spacing rules Trinity, as the incumbent, could not increase its short spacing as Glendale proposes. Rule 73.610(a) explicitly states that "applications for new TV broadcast stations or for changes in the transmitter sites of existing stations will not be accepted for filing if they fail to comply with the [mileage separation] requirements." 47 C.F.R. § 73.610(a) (underlining added). Since TV incumbents must propose fully spaced sites if they relocate, there is no inequality in requiring TV challengers such as Glendale to propose fully spaced sites if available.^{31/}

101. As noted above (¶¶ 90, 92), a waiver of the TV channel spacing rule can only be granted after the applicant establishes that there are no fully spaced sites

^{31/}See ¶¶ 104-106, infra, which confirms that there is a fully spaced site available, the WFOX(FM) tower.

available. K-W TV, Inc., *supra*; North Texas Media v. FCC, *supra*; Ogden Television, Inc., *supra*; On the Beach Broadcasting, *supra* (FM channel spacing waiver denied because applicant made no independent search for a fully spaced site); Caloosa Television Corp. (Reconsideration), 4 FCC Rcd. 4762, 66 Rad. Reg. 2d (P&F) 1303 (1989) (Commission confirms that television short-spacing policy requires applicant to establish there are no fully spaced sites available before a waiver can be granted); Edens Broadcasting, Inc., 2 FCC Rcd. 687, 693, 62 Rad. Reg. 2d (P&F) 599, 606 (Rev. Bd. 1987) (FM applicant denied short-spacing waiver where fully spaced sites are available and applicant did not meet threshold requirement demonstrating there were no suitable fully spaced sites available); Kenter Broadcasting Company, *supra*, *aff'd sub nom*, 62 Rad. Reg. 2d (P&F) 1579 (D.C. Cir. 1987) (FM applicant denied short-spacing waiver in absence of reliable showing no fully spaced sites available); Orange Park Florida TV, Inc. v. FCC, ___ F.2d ___, 62 Rad. Reg. 2d (P&F) 469 (D.C. Cir. 1987) (TV channel spacing waiver denial upheld by court since applicant failed to meet the "well established and judicially upheld "threshold requirement that there were no fully spaced sites available); and Townsend Broadcasting Corporation, 62 F.C.C.2d 511, 512, 38 Rad. Reg. 2d (P&F) 880, 881 (1976) (FM applicant denied short-spacing waiver in absence of proper threshold showing that no fully spaced site was available).

102. Glendale has not crossed this threshold. Instead it seeks approval to do what WHSG (or any other applicant) could not do without meeting this first and essential "high hurdle" needed for waiver of the channel spacing rules. WAIT Radio v. FCC, *supra*. Such an attempt at preferential treatment must be rejected.

7) Glendale Could Have Proposed a Fully-Spaced Site—the WFOX(FM) Tower

103. As identified by Glendale's engineer at the beginning of the process of preparing Glendale's application, there is a large geographic area which Glendale identified where it could have located a transmitter site that would (1) be fully spaced to the Montgomery, Channel 63, allocation, and (2) would provide the requisite city grade coverage to Monroe (Fdgs. ¶¶ 7, 16, 17).^{32/} From any available and suitable site within that area, including the WFOX(FM) tower, the Monroe, channel 63 challenger could meet all of the Commission's technical requirements without a waiver. Hence, a challenger such as Glendale does not need a short-spacing waiver in order to compete with the incumbent.

104. Because there is a suitable site within the fully spaced area identified by Glendale, there is absolutely no "pro-incumbent bias" in requiring Glendale to locate at such a site and thereby maintain the integrity to the spacing rules. Glendale is not disadvantaged in the slightest by such a requirement, since an application specifying a fully spaced site would be grantable. Further, the public interest is better served, because a win by the challenger would convert a grandfathered short-spaced station to a fully spaced station.

105. The WFOX tower is owned by Shamrock Broadcasting, Inc. (Fdgs. ¶ 17). When the tower was constructed in 1984 it was specifically designed to accommodate a

^{32/} Initially Monroe Television, Inc., the first permittee on channel 63, Monroe, was authorized to construct at the WFOX(FM) tower (Fdgs. ¶ 171). That authorization was for a Bogner directionalized antenna at the 538 meter (1,765 feet) above ground level.

high powered television antenna, such as a Bogner or Dielectric antenna (which Glendale proposes) (Fdgs. ¶ 17). The original permittee of channel 63, Monroe Television, Inc., proposed a similar facility on the WFOX tower, which was approved by the Commission (Fdgs. ¶ 16-17). WFOX has been willing to negotiate in good faith, upon inquiry, with perspective tenants or users for lease of space on the tower for a high powered UHF antenna, such as Glendale's (Fdgs. ¶ 19). In this case, even though Glendale had identified the area where it could locate a fully spaced site, including the WFOX tower, no representative of Glendale made any inquiry of WFOX about tower space (Fdgs. ¶ 19).

106. Because Glendale could have specified a fully spaced site, enforcement of the minimum separation requirements of Commission rule 73.1610 creates no bias or prejudice against Glendale. In fact, Glendale seeks preferential treatment, and to avoid compliance with the necessary criteria for a short-spacing waiver. This should not be permitted, and Glendale is not entitled to a waiver of the television spacing rule, Rule 73.610(b).

B. WHSG-TV Renewal Expectancy Standard

1) Introduction

107. The most recently decided renewal cases have established that a licensee's entitlement to a renewal expectancy must be considered according to a template which includes five criteria:

Criterion 1: The licensee's efforts to ascertain the needs, problems and interests of its community;

Criterion 2: The licensee's programmatic response to those ascertained needs;

Criterion 3: The licensee's reputation in the community for serving the needs, problems and interests of the community;

Criterion 4: The licensee's record of compliance with the Communications Act and FCC rules and policies;

Criterion 5: The presence or absence of any special effort at community outreach or towards providing a forum for local self expression.

Fox Television Stations, Inc., 8 FCC Rcd 2361, 72 Rad. Reg. 2d (P&F) 297, 301 (Rev. Bd. 1993), *recon denied* 8 FCC Rcd 3859, *modified* 9 FCC Rcd 62, 74 Rad. Reg. 2d (P&F) 922; Metroplex Communications, Inc. (WHYI-FM), 4 FCC Rcd 8149, 8151, 67 Rad. Reg. 2d (P&F) 185, 190 (Rev. Bd. 1989), *modified* 5 FCC Rcd 5610, 68 Rad. Reg. 2d (P&F) 475 (1990); Seattle Public Schools, 4 FCC Rcd 625, 65 Rad. Reg. 2d (P&F) 1621, 1640 (Rev. Bd. 1989). Accordingly, TBN's record of serving the WHSG-TV service area during its License Term should be evaluated according to the "proper yardstick." Fox Television Stations, Inc., *supra*, 72 Rad. Reg. 2d (P&F) at 302.

108. The task of evaluating WHSG-TV's performance as a licensee is further complicated by two factors, the shortness of the License Term--it was only a year from the time the Station commenced operation until Glendale filed its competing application--and the fact that the License Term encompassed the time immediately after the Station went on the air. While the Commission has dealt with a few renewal cases in which a licensee's record was examined during a shortened or truncated term, *see, e.g., Metroplex Communications, Inc., supra*, TBN has not unearthed a single case in which the Commission has had to evaluate a truncated license term consisting entirely of the time immediately after the Station goes on the air. The shortness of the term and the fact that the pertinent License Term covers the period right after the Station went

on the air places TBN at an automatic disadvantage and makes some of the usual comparative criteria--such as the Station's reputation in the community--virtually meaningless.

109. The Commission's informal processing standards and its own rules recognize the inherent unfairness of attempting to synthesize a meaningful licensee record during a period that is analogous to any new business' shake-down cruise. For example, the Commission staff normally defers acting upon television license applications submitted within six months of the time a renewal application is due to be filed because of the staff's recognition of the patent unfairness of attempting to evaluate a licensee on a shortened record at a time when the licensee and station staff are learning their jobs and when both the station's management and broadcast service is new to the community.

110. Likewise, in Section 73.1740(a)(2) the Commission's rules provide a phased 36 month period before the licensee is required to operate with a full broadcast schedule, and an initial 18 month period when the rules require a minimum broadcast week of 12 hours (a schedule, incidentally, which WHSG-TV exceeded from the very first moment it went on the air) (Fdgs. ¶ 20). The rule is an explicit recognition that hiring and training a staff, dealing with the inevitable problems and technical adjustments of constructing and operating a broadcast station, and introducing the station and its program service to the community may require an extended apprenticeship period.